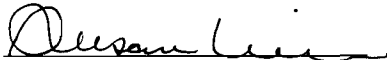


PATENT APPLICATION

CERTIFICATE UNDER 37 CFR 1.6(a)(4): I hereby certify that this correspondence is being deposited with the United States Patent and Trademark Office as an electronic patent filing via Patent Electronic Filing System (EFS) addressed to: Commissioner for Patents on January 5, 2010


Susan Wilkes

1-5-2010
(Date Signed)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No. : 10/814,219
Applicant : Katalin Coburn
Filed : April 1, 2004
Title : PROCESS FOR MAKING NON-EMULSIFIED, SPICED OR FLAVORED PEANUT BUTTER SPREAD, WITH LOWER FAT CONTENT, LONG SHELF LIFE, AND MINIMAL OIL SEPARATION
TC/A.U. : 1764
Examiner : Helen F. Pratt
Confirmation No: 5389
Docket No. : 32416-1001

Mail Stop: Appeal Brief - Patents

Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

BRIEF FOR APPELLANTS
UNDER 37 C.F.R. § 1.192

TABLE OF CONTENTS

<u>Contents of Appeal Brief</u>	<u>Page Number</u>
(1) Real Party of Interest	3
(2) Related Appeals and Interferences	4
(3) Status of Claims	5
(4) Status of Amendments	6
(5) Summary of Claimed Subject Matter	7
(6) Grounds of Rejection to be Review on Appeal	10
(7) Argument	11
Claims Appendix	20
Evidence Appendix	24
Related Proceedings Appendix	25

(1) Real Party in Interest

The real party in interest is Sunland, Inc., the assignee.

(2) Related Appeals and Interferences

There are no other appeals or interferences known to Appellant or Appellant's legal representative or assignee which will directly affect or be directly affected by, or have a bearing on, the Board's decision in the pending appeal.

(3) Status of Claims

Claims 1, 5-8, 11-16, 18, 21, 22, 25, 29-33, 35-43 and 45-52 are pending in this case, stand finally rejected, and are the subject matter of this appeal.

(4) Status of Amendments

The Examiner issued a final office action on July 15, 2008. Applicant filed a notice of appeal and appeal brief in response to the final office action. The Examiner withdrew the application from appeal and issued a non-final office action on February 23, 2009. Applicant filed a response to the non-final office action on June 19, 2009. The Examiner issued a final office action on September 10, 2009. Applicant filed a notice of appeal in response to the final office action. This appeal brief is in response to the Examiner's final office action issued on September 10, 2009.

(5) Summary of Claimed Subject Matter

The independent claims under appeal are claims 1, 14, 33, and 42. Claim 1 is directed to "a manufacturing process for producing nut butter". Claims 5-8 and 11-13, 21, 29, 31 depend from claim 1. Claim 14 is directed to "a nut butter". Claims 15, 18, 22, 25, 30, and 32 depend from claim 14. Claim 33 is directed to "a manufacturing process for producing a nut butter spread". Claims 35-41, 47, 49 and 51 depend from claim 33. Claim 42 is directed to "a nut butter spread". Claims 43, 45-46, 48, 50, and 52 depend from claim 42. There are no means-plus-function or step-plus-function claims.

The nut butter, nut butter spread and manufacturing process of the nut butter and nut butter spread of the independent claims is described in the specification. Embodiments of the present invention provide a nut butter and nut butter spread and a manufacturing process for manufacturing the natural nut butter, spiced and/or flavored nut butters and nut butter spreads. The nut butters and nut butter spreads exhibit very low oil separation, long shelf life, good spreadability and texture, and have a lower fat content without the use of hydrogenated oils, stabilizers, emulsifiers, bulking agents and without utilizing an emulsification process.

Embodiments of the present invention comprise nuts that are roasted and ground to a coarse consistency paste. The nuts preferably have a nut particle size ranging from about 1.5 to about 3.5 mm after grinding to produce a nut butter or nut butter spread. The process according to an embodiment of the present invention eliminates the addition of stabilizers and the requirement of an emulsification process. The resultant nut butter and nut butter spreads do not contain any stabilizers, bulking agents, hydrogenated oils or emulsifiers.

Claims Charts and Support in Specification

Below are claims charts identifying the independent claims on appeal, with each element mapped to the specification by paragraph number.

Claim Elements for Independent Claim 1	Identification and Mapping of Claims to Specification by paragraph number and/or drawings
1. A manufacturing process for producing nut butter comprising:	0003, 0019, 0040, 0063, 0065-0066
roasting nuts;	0023, 0027, 0034, 0042
grinding the roasted nuts to a coarse consistency paste having nut particles ranging in size from about 1.5 to about 3.5 mm to produce a nut butter;	0023, 0044, 0046, 0056,
the resulting nut butter not containing hydrogenated oils;	0025, 0035
the resulting nut butter not containing stabilizers;	0025, 0030, 0040, 0059
the resulting nut butter not containing an emulsifier; and	0025, 0040, 0059
the resulting nut butter not containing a bulking agent.	0025, 0040, 0057

Claim Elements for Independent Claim 14	Identification and Mapping of Claims to Specification by paragraph number and/or drawings
14. A nut butter comprising:	0003, 0019, 0040, 0063, 0065-0066
coarse ground roasted nuts having nut particles ranging in size from about 1.5 to about 3.5 mm;	0023, 0044, 0046, 0056
said nut butter not containing hydrogenated oils;	0025, 0035
said nut butter not containing stabilizers;	0025, 0030, 0040, 0059
said nut butter not containing an emulsifier; and	0025, 0040, 0059
said nut butter not containing a bulking agent.	0025, 0040, 0057

Claim Elements for Independent Claim 33	Identification and Mapping of Claims to Specification by paragraph number and/or drawings
33. A manufacturing process for producing nut butter spread comprising:	0003, 0019, 0040, 0063, 0065-0066
roasting nuts;	0023, 0027, 0034, 0042
grinding the roasted nuts to a coarse consistency paste having nut particles ranging in size from about 1.5 to about 3.5 mm to produce a nut butter;	0023, 0044, 0046, 0056,
adding a spread ingredient to produce a nut butter spread;	0063, 0064, 0065, 0066
the resulting nut butter not containing hydrogenated oils;	0025, 0035
the resulting nut butter not containing stabilizers;	0025, 0030, 0040, 0059
the resulting nut butter not containing an emulsifier; and	0025, 0040, 0059
the resulting nut butter not containing a bulking agent.	0025, 0040, 0057

Claim Elements for Independent Claim 42	Identification and Mapping of Claims to Specification by paragraph number and/or drawings
42. A nut butter spread comprising:	0003, 0019, 0040, 0063, 0065-0066
coarse ground roasted nuts having nut particles ranging in size from about 1.5 to about 3.5 mm and a spread ingredient;	0023, 0044, 0046, 0052, 0056
said nut butter not containing hydrogenated oils;	0025, 0035
said nut butter not containing stabilizers;	0025, 0030, 0040, 0059
said nut butter not containing an emulsifier; and	0025, 0040, 0059
said nut butter not containing a bulking agent.	0025, 0040, 0057

(6) Grounds of Rejection to be Reviewed on Appeal

Claims 1, 6-8, 11-15, 18, 21, 22, 25, 29-33, 35-43, and 45-52 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Edson (306,727) or Rombauer (page 564) in view of the prior art (specification page 7, lines 15-22) and Cammarn et al. (5,417,999) and Avera (3,615,590) and Stockton (1,395,934) and further in view of Yokoyama et al. (4,814,195).

Claim 5 is rejected under 35 U.S.C. § 103(a) as being unpatentable over the above references as applied to the above claims, and further in view of Bolton (1,687,154).

(7) Argument

Claims 1, 5-8, 11-15, 18, 21, 22, 25, 29-33, 35-43, and 45-52 are believed to be patentable.

- (A) Rejection of claims 1, 6-8, 11-15, 18, 21, 22, 25, 29-33, 35-43, and 45-52 under 35 U.S.C. § 103(a) as being unpatentable over Edson (306,727) or Rombaur (page 564) in view of the prior art (specification page 7, lines 15-22) and Cammarn et al. (5,417,999) and Avera (3,615,590) and Stockton (1,395,934) and further in view of Yokoyama et al. (4,814,195).

In rejecting Applicant's claims, the Examiner relies on the combination of not one, two, three, four or even five references, but six different references! In so doing, the Examiner is forced to combine references that teach away not only from each other, but which also teach away from Applicant's claimed invention. Applicant's amended claims recite a process having a coarse consistency paste with nut particles in a size ranging from about 1.5 to about 3.5 mm and not containing hydrogenated oils, not containing an emulsifier, not containing stabilizers and not containing a bulking agent. The prior art does not teach or render obvious this invention.

To reject a claim based on obviousness, the Examiner must resolve several factual inquiries. See MPEP § 2143. The Examiner must articulate the following:

(1) a finding that the prior art included each element claimed, although not necessarily in a single prior art reference, with the only difference between the claimed invention and the prior art being the lack of actual combination of the elements in a single prior art reference;

(2) a finding that one of ordinary skill in the art could have combined the elements as claimed by known methods, and that in combination, each element merely performs the same function as it does separately;

(3) a finding that one of ordinary skill in the art would have recognized that the results of the combination were predictable; and

(4) whatever additional findings based on the Graham factual inquiries may be necessary, in view of the facts of the case under consideration, to explain a conclusion of obviousness.

The rationale to support a conclusion that the claim would have been obvious is that all the claimed elements were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions, and the combination yielded nothing more than predictable results to one of ordinary skill in the art. KSR Int'l Co. v. Teleflex, Inc., 550 U.S. 398 (1997).

Applicant's independent claims 1, 14, 33 and 42 recite "...grinding the roasted nuts to a coarse consistency paste having nut particles ranging in size from about 1.5 to about 3.5 mm ... not containing hydrogenated oils, not containing an emulsifier, not containing stabilizers and not containing a bulking agent."

The Examiner attempts to combine Applicant's specification, Cammarn et al., Avera, Stockton, and Yokoyama et al. to remedy the deficiencies of Edson or Rombauer. Each of these references is discussed below.

Edson

In the final office action dated September 10, 2009, the Examiner argues on page 2, last paragraph that "Edson discloses a process of making a peanut paste by roasting peanuts and grinding the peanuts as in claim 1."

However, Edson fails to disclose or even mention grinding the roasted nuts to a coarse consistency paste having nut particles ranging in size from about 1.5 to about 3.5 mm to produce a nut butter as recited in Applicant's independent claims.

The Examiner also argues that "Edson discloses Applicant's process and does not require any of the ingredients or processes, which are not required as in claims 1". We note that Edson, entitled "Manufacture of Peanut Candy", discloses a process of making a peanut candy using one part peanut-paste and seven parts sugar (see Edson lines 44-46). Edson also discloses using flour or fluids which are considered bulking agents (see Edson Col. 1, lines 38-39). For example, Edson states "[the peanut paste] will again become fluid by raising its temperature to about 100° Fahrenheit, and in this liquid form is easily mixed or compounded with flour or fluids" (see Edson lines 36-39). The Examiner cannot limit what is portion of a reference is relevant. The reference is relevant for all it contains. See MPEP § 2123(I). For example, one skilled in the art after reviewing this entire reference would learn that a bulking agent, flour, is at least sometimes added to Edson's fluid peanut paste. Both Edson's intermediate step and final step, namely the liquid form of the peanut paste and the peanut candy comprise flour. Thus, Edson teaches away from Applicant's claims which recite, "a nut butter [or nut butter spread]...not containing a bulking agent."

Rombauer

The Examiner also rejected Applicant's claims under Rombauer, stating on page 2, last paragraph, "Rombauer discloses a process of making peanut butter by roasting and grinding nuts in amounts over 90% with oil (page 564, under "Peanut Butter") (claims 31, 32)". Rombauer is an excerpt from *Joy of Cooking* and fails to teach any of the elements of Applicant's recited claims. In fact, Rombauer's entire disclosure merely teaches that federal regulations require commercial peanut butter to contain 90% shelled roasted ground peanuts and that one can make their own peanut butter in an electric

blender. Rombauer fails to disclose grinding nuts to a coarse consistency paste, fails to disclose a nut particle size and fails to disclose a nut butter or nut butter spread not containing hydrogenated oils, stabilizers, an emulsifier or a bulking agent as recited in Applicant's claims. Rombauer simply discloses how commercial peanut butters are made without the germ of the nut.

The Examiner then argues that, "[n]othing has been shown that grinding as in Rombauer would have not produced the claimed particle size". However, Rombauer fails to suggest, disclose or even mention grinding to a coarse consistency paste with particular particle sizes. Then the Examiner admits that Rombauer differs from Applicant's claim 1 "in the step of grinding to a coarse paste with a particular particle size". See the bottom of page 2 of the office action.

Yokoyama et al.

The Examiner attempts to use Yokoyama et al. to remedy just one of many of the deficiencies of both Edson and Rombauer, namely particle size. Specifically, the Examiner states on the top of page 3 that "Yokoyama et al. disclose a peanut butter, which uses 1/8 inch peanut particles in a chunky peanut butter, which is within the claimed particle size". However, the 1/8 inch peanut bits of Yokoyama et al. are "incorporated into a smooth peanut butter-type base" (see Yokoyama et al., Col. 9, lines 44-46). The peanut bits in Yokoyama et al. are added to an already smooth peanut butter. The bits are not a coarse consistency paste used to produce the nut butter and nut butters spreads as recited in Applicant's independent claims. Yokoyama et al. differ from Applicant's recited claims since the peanut butter as taught by Yokoyama et al. has a smooth consistency, and Applicant's recite grinding nuts to a coarse consistency paste. Simply adding peanut bits to a smooth peanut butter base fails to teach grinding nuts to a particular nut size to create a coarse nut paste. While Applicant's claimed nut particles produce the nut butter or nut butter spread, Yokoyama et al. disclosed peanut particles are added to a finished peanut butter to make the peanut butter "crunchy".

Further, Yokoyama et al. teach that "the reduction in calories is achieved by adding one or more non- or low-calorie solid bulking agents, such as polydextrose or microcrystalline, to the peanut butter" (see Yokoyama et al., Col. 2, lines 64-68). The bulking agents disclosed in Yokoyama et al. account for 15% to 40% by weight of the disclosed peanut butter (see Yokoyama et al., Col. 2, line 68 to Col. 3, line 1). Thus, Yokoyama et al. teach the opposite of a nut butter not containing a bulking agent as recited in Applicant's claims since the peanut butter disclosed in Yokoyama et al. contains a large amount of bulking agents. This is a very typical type of peanut butter one will find in the supermarket, and is not Applicant's invention.

The Examiner attempts to combine Applicant's specification, Cammarn et al. and Avera to remedy the deficiencies of Edson combined with Yokoyama et al. or Rombauer combined with Yokoyama et al. Each of these references is discussed below.

Applicant's Specification

The Examiner states, "Applicant's specification on page 7, lines 15-21 discloses that it is known to make natural peanut butters without adding hydrogenated fats or emulsifiers." However, the Examiner failed to note the most important following sentence in the specification on page 7, lines 19-21, which states when referring to the peanut butters in the references, as follows: "The resulting peanut butter . . . exhibits gravitational instability, i.e., oil separation on the top of the product." Applicant's invention does not have such oil separation on top of the product because of its coarse grinding and specific particle size. The Examiner does admit that none of the references disclose a nut butter or nut butter spread made from a coarse consistency paste. These natural peanut butters teach away from Applicant's invention. Applicant's specification then goes on (pages 8-9) to describe how stabilizers, emulsifiers and bulking agents are added to these cited peanut butters.

Cammarn et al.

Cammarn et al. teach a system which relies on a stabilizer, "the peanut butters or spreads of the present invention preferably comprise from about 1% to about 5% by weight of a stabilizer" (see Cammarn et al., Col. 3, lines 16-18). Cammarn et al. also teach the use of an emulsifier. For instance, Cammarn et al. state, "the peanut butters of the present invention can contain an emulsifier" (see Cammarn et al., Col. 3, lines 34-36). Because Applicant's independent claims recite "the process not containing stabilizers" and "the process not containing emulsifiers", Cammarn et al. teach away from Applicant's claimed invention.

Avera

Avera teaches the use of stabilizers. For example, "it is desirable to add to the slurry, prior to roasting, a material that functions as a stabilizer" (see Avera Col. 1, lines 69-71). Avera also teaches the use of hydrogenated oils. Avera states, "[a]ny compatible high melting fat component may be used as the stabilizer... a partially hydrogenated fat, a completely hydrogenated fat, mono (and di-) glyceride esters of the saturated fatty acids, or mixtures of these firming-up agent" (see Col. 6, lines 12-18). Therefore, Avera clearly teaches away from Applicant's recited claims.

Avera further teaches away from Applicant's claimed invention of using coarse ground roasted nuts by relying on the use of blanched nuts (see Avera Abstract). The additional step of blanching nuts not only significantly increases the cost and complexity of the overall process, but can also break apart some nuts and then results in a portion of the raw materials being discarded, and thus wasted. Because Applicant's invention teaches away from the increased costs, complexity, and wastefulness associated with blanching the nuts, and because it is believed that Applicant's use of roasted nuts helps reduce residual natural oils released from grinding the nuts, Applicant's claims are directed to the use of roasted nuts. Avera thus teaches away from Applicant's claimed invention, which uses unblanched nuts.

Further, Avera adds chunks of peanuts to a slurry for crunchy peanut butter. This teaches away

from Applicant's nut particle size since Avera first grinds the nut butter to a fluid slurry (see Avera, Col. 1, line 13 and Col. 2, lines 65-67) and then later adds chunks to make the nut butter crunchy (see Avera, Col. 6, lines 45-50). Applicant simplifies the process by grinding to a coarse consistency and thus does not require adding nut chunks after the grinding step.

The Examiner argues that "Avera was used for the teaching that roasting develops flavors and that grinding develops a temperature of about 160° F". See Page 11, first paragraph of the present final office action. However, the Examiner cannot pick and choose what is taught in a specific reference. "The use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain". See MPEP § 2123(I). The entire reference must be considered for all it contains. In this case, Avera teaches the opposite of Applicant's claims by teaching the use of a stabilizer, a hydrogenated oil, blanched nuts and a fluid slurry. All of these elements, as taught in Avera, teach away from Applicant's independent claims.

Stockton

The Examiner next offers Stockton to remedy the deficiencies of the combination of Edson or Rombauer, Yokoyama et al., Cammarn et al. and Avera. The Examiner specifically states on page 3 of the office action, "Stockton discloses that the degree of oil separation can be prevented partially by coarse grinding, that the finer the grinding the more pronounced the tendency to gravitational separation (page 1, lines 89-103)". However, what Stockton actually discloses at the portion cited is:

[t]his difficulty of oil separation being foreseen may in only a very partial degree be prevented by coarse grinding; for the finer the grinding of the kernels the more pronounced the tendency to gravitational separation. But coarse ground peanut butter is less desirable. It is mealy and does not spread well, and furthermore it is less readily digested than fine ground butter. Another expedient that has been resorted to, to prevent in some measure this gravitational separation is to diminish the value of the fraction of oil in the mass. . .".

Thus, not only does Stockton teach away from coarse grinding to control oil separation, but Stockton also teaches away from Applicant's claimed invention by denouncing coarse grinding and graphically describing the less than desirable results that are associated with Applicant's coarse grind.

Stockton, at columns 5 and 6, goes into great detail about how that invention relies on hydrogenated oils and/or other stabilization oils to prevent separation of the peanut oil from the peanut solids. Accordingly, Stockton relies upon a principal problem which Applicant's invention seeks to address. The use of hydrogenated oils and/or other stabilization oils is thus the antithesis of Applicant's claimed invention. Further, Stockton fails to give any examples of nut particle sizes as recited by Applicant's amended claims.

Again, the entire patent must be considered for all it contains. See MPEP § 2123(I). In this case, Stockton teaches using hydrogenated oil and/or stabilization oils and the desire for a smooth and

not coarse nut butter. These teachings clearly teach away from Applicant's independent claims. Further, it would not be obvious to one skilled in the art to choose a portion of Stockton's disclosure that actually teaches away from Applicant's coarse consistency nut paste and use it to produce a new nut butter.

- (B) Rejection of claim 5 under 35 U.S.C. § 103(a) as being unpatentable over Edson (306,727) or Rombaur (page 564) in view of the prior art (specification page 7, lines 15-22) and Cammarn et al. (5,417,999) and Avera (3,615,590) and Stockton (1,395,934) and Yokoyama et al. (4,814,195) and in further view of Bolton (1,687,154).

Bolton

The Examiner in rejecting claim 5 attempts to combine all the cited references, and further adds Bolton. Claim 5 recites blending at least one ingredient selected from the group consisting of spices, herbs, dried fruits, extracts of the same, salt and sugar, with the nut paste during grinding. The Examiner states on the bottom of page 7 of the office action that "Bolton discloses that it is known to add cucumbers to peanut butter (col. 1, lines 12-50). Therefore, it would have been obvious to add known ingredients to the peanut paste in the process of the combined references." However, Applicant is not adding cucumbers to the nut paste. Thus, Bolton fails to disclose any element recited in Applicant's claim 5.

Bolton teaches a food product comprising a nut butter with water and cut up cucumber pickles (Bolton lines 84-86). Bolton also teaches having a food product with a consistency of cheese or heavy jelly, which teaches away from Applicant's claimed nut particle size. Thus, Bolton teaches away from Applicant's recited claims by teaching adding water to a nut butter as well as adding cucumber pickles to the nut butter.

Improper Combination

The references cited by the Examiner are an improper combination. As illustrated above, many of the references teach away from each other. For example, Rombauer's peanut butter that is at least 90% peanuts could not be combined with Yokoyama et al. since the peanut butter disclosed in Yokoyama et al. contains 15 to 40% by weight bulking agent (see Yokoyama et al. Co. 2, line 68 to Col. 3, line 1). Edson's peanut candy could not be combined with the "crunchy" peanut butter of Yokoyama et al. since Edson's peanuts are required to be in a fluid or semi-fluid state (see Edson lines 29-32). Bolton could also not be combined with Rombauer. Rombauer teaches that federal regulations require commercial peanut butter to contain at least 90% shelled roasted ground peanuts while Bolton adds cucumber pickles to a food product having a consistency of cheese. The food product of Bolton does not contain the required 90% shelled roasted ground peanuts as taught in Rombauer. Further, Avera uses blanched nuts while Cammarn et al. teaches the opposite, using unblanched white-skinned peanuts. Thus, one skilled in the art would not combine the cited references since many of them teach away from each other and

some even teach opposite elements.

Summary

None of the cited references disclose grinding roasted nuts to a coarse consistency paste having nut particles ranging in size from about 1.5 to about 3.5 mm to product a nut butter or nut butter spread. Further, all but one of the references teach away from Applicant's claims since the products contain at least one hydrogenated oil, emulsifier, stabilizer and/or bulking agent. For example, Edson uses flour or fluids which are considered bulking agents (see Edson Col. 1, lines 38-39). Yokoyama et al. use a large amount of bulking agents (see Yokoyama et al. Col. Abstract). Cammarn et al. use soybean and rapeseed hardstock as stabilizers (see Cammarn et al. Col. 4, line 46). Avera uses lightly hydrogenated or hardened oil as stabilizers (see Avera Col. 2, line 56). Stockton also uses hydrogenated oils as stabilizers (see Stockton Col. 5, line 65 to Col. 6, line 3). All but one of the cited references relied on by the Examiner contain ingredients which Applicant's recited claims do not have. Rombauer is the only reference that does not contain an ingredient that is also not in Applicant's recited claims. However, Rombauer's entire disclosure only teaches that federal regulations require commercial peanut butter to contain 90% shelled roasted ground peanuts and that one can make their own peanut butter in an electric blender. In contrast, Applicant's claims recite, "grinding the roasted nuts to a coarse consistency paste having nut particles ranging in size from about 1.5 to about 3.5 mm ... not containing hydrogenated oils, not containing an emulsifier, not containing stabilizers and not containing a bulking agent".

In addition, none of the cited references cited by the Examiner specify or even mention ranges of nut particle size. Even if particle size were disclosed or inherent in one or more of the cited references, the particle size range recited by Applicant would not be the particle size of the cited references. In other words, the cited references would not utilize the same particle size as Applicant. For instance, Edson teaches peanuts that are "ground into a fluid or semi-fluid state, having a consistency of rather thick or heavy molasses or cream" (see Edson lines 29-32). Thus, a nut particle size in Edson would not be nearly as large as Applicant's 1.5 to 3.5 mm particle size. Yokoyama et al. disclose that larger particle sizes are perceived as imparting grittiness to peanut butter products, an especially undesirable feature for a food product that ideally is smooth in texture (see Yokoyama et al. Col 3 line 65 to Col. 4, line 1). Therefore, Yokoyama et al. teach away from the large particle size range recited in Applicant's claims. Further, Avera discloses that a "slurry is passed through a fine mill 12, that grinds the solids to a sufficiently small size to make a smooth product. It is preferably ground so that at least 96 percent will pass through a standard U.S. sieve of 200 mesh size" (see Avera Col. 2, lines 65-68). Applicant's nut particle size range of 1.5 to 3.5 mm could not pass through a sieve of 200 mesh size (0.076 mm). Stockton teaches that "ordinarily, fine grinding is preferred" (see Stockton lines 59-60), thus teaching away from the coarse grinding of Applicant's recited claims. Therefore, all of the cited references disclose a nut particle size that is much smaller than the nut particle size recited by Applicant.

The Examiner states that "the various references were used in combination for what was cited in

the office action and for teachings that show that it would have been obvious to make a composition as application has done". However, the various references are relevant for all they contain and cannot be taken for teaching just bits and pieces of each one. None of the references cited by the Examiner teach "the resulting nut butter spread not containing hydrogenated oils; the resulting nut butter spread not containing stabilizers; the resulting nut butter spread not containing an emulsifier; and the resulting nut butter spread not containing a bulking agent" as recited by Applicant's independent claims. The references also do not render Applicant's claims obvious since all but one of the references teach using at least one of the ingredients that is not contained in Applicant's claims. The remaining reference, Rombauer, teaches nothing about ingredients of a nut butter or nut butter spread. Rather, Rombauer merely teaches the federal regulation requirements for commercial peanut butter. Applicant's claims recite, "grinding the roasted nuts to a coarse consistency paste having nut particles ranging in size from about 1.5 to about 3.5 mm ... not containing hydrogenated oils, not containing an emulsifier, not containing stabilizers and not containing a bulking agent". None of the references teaches a nut particle range or that a hydrogenated oil and/or a stabilizer and/or an emulsifier and/or a bulking agent is not in a nut butter or nut butter spread. The Examiner cannot pick and choose what each reference teaches since clearly one skilled in the art would consider and learn from each reference as a whole. Thus, since all of the references as a whole teach away from Applicant's claims, it would not be obvious to one skilled in the art to NOT add all of the ingredients and to grind the nut paste to a coarse consistency as recited in Applicant's claims.

The references cited by the Examiner do not disclose or render obvious Applicant's claims, and teach away from Applicant's invention. Because the cited references cited by the Examiner teach away from each other, the Examiner's proposed modifications to them, in an attempt to result in Applicant's claimed invention, thus renders the cited inventions being modified unsatisfactory for their intended purpose. See *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

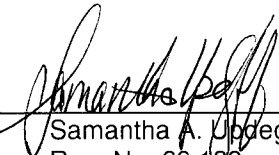
Because none of the references cited by the Examiner disclose nut particle size ranges as recited by Applicant's claims; and because the individual inventive elements of Applicant's claimed invention are not all disclosed in the numerous cited references by the Examiner even in a post facto manner; and because the cited references teach away from Applicant's invention; and because the cited references teach away from each other; and because one skilled in the art would not attempt to so combine the details of the numerous references in such a novel and non-obvious manner; and because the Examiner's combination of the numerous cited references renders them unsatisfactory for their intended purpose, the novel combination of the cited references cited by the Examiner is thus inappropriate in rejecting Applicant's claims.

Therefore, claims 1, 14, 33 and 42 are patentable. Claims 5-8, 11-16, 18, 21, 22, 25, 29-33, 35-43, and 45-52, which are dependent on claims 1, 14, 33 and 42, are also patentable.

(8) Claims Appendix (Attached).

Respectfully submitted,

PEACOCK MYERS, P.C.

By: 
Samantha A. Updegraff
Reg. No. 60,199
Direct Dial: (505) 998-6124

Peacock Myers, P.C.
P.O. Box 26927
Albuquerque, New Mexico 87125-6927

Telephone: (505) 998-1500
Facsimile: (505) 243-2542

Customer No. 005179

G:\A-CLIENTS\Sunland, Inc\PAT\Appeal II\Appeal Brief Sunland - due 011009.doc

CLAIMS APPENDIX

Claim 1. A manufacturing process for producing nut butter comprising:

- roasting nuts;
- grinding the roasted nuts to a coarse consistency paste having nut particles ranging in size from about 1.5 to about 3.5 mm to produce a nut butter;
- the resulting nut butter not containing hydrogenated oils;
- the resulting nut butter not containing stabilizers;
- the resulting nut butter not containing an emulsifier; and
- the resulting nut butter not containing a bulking agent.

Claims 2-4. (canceled).

Claim 5. The process of claim 1, further comprising blending at least one ingredient selected from the group consisting of spices, herbs, dried fruits, extracts of same, salt, and sugar, with the nut paste during grinding.

Claim 6. The process of claim 1, wherein, immediately after grinding, the coarse nut paste has a temperature ranging from 145 degrees Fahrenheit to 165 degrees Fahrenheit.

Claim 7. The process of claim 1, further comprising mixing and blending the coarse nut paste into a continuously agitating, mixing tank and adding salt and/or sugar into the tank.

Claim 8. The process of claim 7, further comprising adding at least one ingredient selected from the group consisting of spices, herbs, dried fruits and/or extracts.

Claims 9-10. (canceled).

Claim 11. The process of claim 7, wherein mixing and blending is for 5 to 15 minutes.

Claim 12. The process of claim 11, wherein, immediately after mixing and blending, the nut butter has a temperature ranging from 120 degrees Fahrenheit to 125 degrees Fahrenheit.

Claim 13. The process of claim 12 further comprising the step of pumping the nut butter into a depositing system and depositing the nut butter into one or more containers.

Claim 14. A nut butter comprising:

- coarse ground roasted nuts having nut particles ranging in size from about 1.5 to about 3.5 mm;
- said nut butter not containing hydrogenated oils;
- said nut butter not containing stabilizers;
- said nut butter not containing an emulsifier; and
- said nut butter not containing a bulking agent.

Claim 15. The nut butter of claim 14, wherein said nuts have a USDA color of 4, or slightly above.

Claims 16-17. (canceled).

Claim 18. The nut butter of claim 14, further comprising at least one ingredient selected from the group consisting of spices, herbs, dried fruits and/or extracts of same, salt and/or sugar.

Claims 19-20. (canceled).

Claim 21. The process of claim 1 wherein the nuts comprise peanuts.

Claim 22. The nut butter of claim 14 wherein said nuts comprise peanuts.

Claims 23-24. (canceled)

Claim 25. The nut butter of claim 18 wherein said at least one ingredient comprises 0.75% to 20% of said nut butter.

Claims 26-28. (canceled).

Claim 29. The process of claim 1 wherein the nuts comprise skins.

Claim 30. The nut butter of claim 14 further comprising nut skins.

Claim 31. The process of claim 1 wherein the nut butter comprises 90% to 99.18% nut content.

Claim 32. The nut butter of claim 14 wherein said nut butter comprises 90% to 99.18% nut content.

Claim 33. A manufacturing process for producing a nut butter spread comprising:

- roasting nuts;
- grinding the roasted nuts to a coarse consistency paste having nut particles ranging in size from about 1.5 to about 3.5 mm to produce a nut butter;
- adding a spread ingredient to produce a nut butter spread;
- the resulting nut butter spread not containing hydrogenated oils;
- the resulting nut butter spread not containing stabilizers;
- the resulting nut butter spread not containing an emulsifier; and
- the resulting nut butter spread not containing a bulking agent.

Claim 34. (canceled).

Claim 35. The process of claim 33 wherein the spread ingredient comprises at least one ingredient selected from the group consisting of spices, herbs, dried fruits, extracts of same, salt and sugar, with the nut paste during grinding.

Claim 36. The process of claim 33 wherein, immediately after grinding, the coarse nut paste has a temperature ranging from 145 degrees Fahrenheit to 165 degrees Fahrenheit.

Claim 37. The process of claim 33 further comprising mixing and blending the coarse nut paste into a continuously agitating, mixing tank and adding salt and/or sugar into the tank.

Claim 38. The process of claim 37 further comprising at least one ingredient selected from the group consisting of spices, herbs, dried fruits and/or extracts.

Claim 39. The process of claim 37 wherein mixing and blending is for 5 to 15 minutes.

Claim 40. The process of claim 39 wherein, immediately after mixing and blending the nut butter spread has a temperature ranging from 120 degrees Fahrenheit to 125 degrees Fahrenheit.

Claim 41. The process of claim 40 further comprising the step of pumping the nut butter spread into a depositing system and depositing the nut butter spread into one or more containers.

Claim 42. A nut butter spread comprising:

coarse ground roasted nuts having nut particles ranging in size from about 1.5 to about 3.5 mm
and a spread ingredient;

said nut butter spread not containing hydrogenated oils;

said nut butter spread not containing stabilizers;

said nut butter spread not containing an emulsifier; and

said nut butter spread not containing a bulking agent.

Claim 43. The nut butter spread of claim 42 wherein said nuts have a USDA color of 4, or slightly above.

Claim 44. (canceled).

Claim 45. The nut butter spread of claim 42 further comprising at least one ingredient selected from the group consisting of spices, herbs, dried fruits and/or extracts of same, salt and/or sugar.

Claim 46. The nut butter spread of claim 45 wherein said at least one ingredient comprises 0.75% to 20% of said nut butter spread.

Claim 47. The process of claim 33 wherein said nuts comprise peanuts.

Claim 48. The nut butter spread of claim 42 wherein said nuts comprise peanuts.

Claim 49. The process of claim 33 wherein the nuts comprise skins.

Claim 50. The nut butter spread of claim 42 further comprising nut skins.

Claim 51. The process of claim 33 wherein the nut butter spread comprises 65% to 86.7% nut content.

Claim 52. The nut butter spread of claim 42 wherein said nut butter spread comprises 65% to 86.7% nut content.

EVIDENCE APPENDIX

None.

RELATED PROCEEDINGS APPENDIX

None.